

The Budget and Court-Appointed Experts

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A Chicago Tribune article, available [here](#), states that an Illinois public defender recently moved to prohibit the state from seeking the death penalty against her client because the state does not have enough money to pay for the expert witnesses that she believes she will need at the penalty phase of the trial. Apparently, Illinois has a fund specifically for expert fees in capital cases, and the fund for the fiscal year has run dry with several months left to go. The public defender says that the experts she needs are "fed up" and refuse to accept more capital cases. The prosecution opposes the motion, and there's been no ruling yet. I've blogged previously about the financial crisis and the death penalty -- [here](#) -- but the impact of the financial crisis on expert witnesses is a new angle, one with implications beyond the capital context. Could defense lawyers in North Carolina make a similar argument?

The short answer is, I doubt that such an argument would be viable now, but depending on what happens with the state budget, it could become so in the next few years. The Office of Indigent Defense Services pays for experts in cases involving indigent defendants, which is a huge proportion of all defendants in serious cases, including virtually all capital defendants. IDS doesn't have a separate fund for experts, or even for capital cases -- it has a single pot of money that it uses to pay experts, investigators, and court-appointed lawyers, in capital and non-capital cases alike. (IDS has a separate pot of money that it uses to pay public defenders.) To give a sense of scale, for the fiscal year ending in 2009, that fund contained about \$85,000,000.

At the end of each fiscal year that ended in calendar years 2002 through 2006, the fund was millions of dollars in debt -- often in the \$5,000,000 to \$10,000,000 range -- meaning that all the money was spent and there were still unpaid bills outstanding from lawyers and experts. The result was that bills submitted by lawyers or experts in the last month or two of the fiscal year weren't paid until the beginning of the next fiscal year. In the most recent two fiscal years, those ending in 2007 and 2008, the fund ended the year with about a half-million dollars in debt, which was small enough relative to the overall size of the fund that there were no appreciable delays.

IDS says that there will be a shortfall of about \$7,000,000 at the end of this fiscal year -- the agency's talking points are [here](#) -- meaning about six weeks' worth of delays. That's comparable to what we saw from 2002 through 2006, and still far short of what the Illinois public defender claims is happening there, where it sounds like delays for experts have reached four months. I doubt that many North Carolina courts would be receptive to the argument that it's impossible to find an expert who will work in the face of a possible six week delay in payment.

But given the budget crisis, could we see longer delays in the next year or two? Absolutely. I have no special expertise at reading budget documents, but I've looked at both the governor's recommended budget and at the budget passed by the Senate. Both seem to recommend about \$10,000,000 more for IDS in the next fiscal year, which IDS projects will leave about a \$7,000,000 shortfall. If that translates into six weeks of delay, that's not likely to be a constitutional crisis. (Which isn't to say that lawyers or experts will, or should be, happy about it.) But it looks like the governor recommends basically flat spending for the following fiscal year, while the Senate budget actually recommends a substantial reduction in spending. If the demand for IDS payments continues to grow -- as it has in every prior year -- and the agency receives a budget reduction, the situation might be much more serious. Payments could be delayed by several months, as they apparently are in Illinois, and that really might start to give experts -- and thus the courts -- pause. Alternatively, IDS could reduce hourly rates for lawyers and/or limit experts' fees, steps that

carry their own legal and political risks.